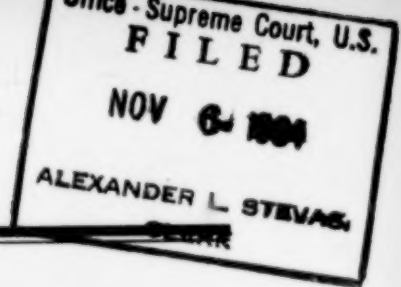


No. 84-476



IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ROBERT McDONALD,
Petitioner,
v.

DAVID I. SMITH,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 6, 1984

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QUESTIONS PRESENTED

1. Can a defendant, who knowingly makes a false statement about an applicant for a Presidential appointment, rely on any privilege provided by the Petition Clause of the First Amendment, even though the statements were published to persons unrelated to the formal appointment process and, if so, is the applicable privilege qualified or absolute?

2. If such a defendant can rely on the privilege but it is not absolute, should this Court now consider whether the Petition Clause requires increased procedural protections, including judicial discretion to award costs and legal fees to a defendant if he ultimately prevails?

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RESPONDENTS BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Fourth Circuit's opinion, which is reproduced at pages 1a through 6a of the Appendix A to the Petition, contains a concise statement of the relevant facts and the proceedings in the District Court. 737 F.2d 427, 427-28 (4th Cir. 1984).

The district court determined that McDonald was not entitled to judgment on the pleadings pursuant to a privilege provided by the Petition Clause of the First Amendment because the available privilege is not absolute, but qualified. Petition, App. B at 9a. The Fourth Circuit

affirmed that ruling on the same ground. Petition, App. A at 3a.

It was unnecessary to the denial of judgment on the pleadings to determine whether McDonald's publication to persons unrelated to the appointment process¹ would deny him even a qualified privilege, and neither court below addressed the question.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT.

The Fourth Circuit is the only circuit found to have determined the relationship between a state's interest in protecting its citizens from common law torts and the rights under the Petition Clause, when knowing falsity is alleged. The courts below determined that this Court's *Noerr-Pennington* decisions² left undisturbed "the common law precept that the right to petition can be abused by malice," and pointed out that abuse of the right to petition was recognized by the doctrine itself. Petition, App. A at 6a; see *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). Such a determination is entirely consistent with the decisions of other circuits. McDonald's contrary claims, Petition at 10-13, misrepresent the holdings of cases in other circuits to present an illusion of conflict where none exists.

McDonald claims that two circuit court decisions conflict with the Fourth Circuit below, *Stern v. United*

¹ McDonald admits allegation of such publication. Petition at 2 n.2.

² *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

States Gypsum, Inc., 547 F.2d 1329 (7th Cir. 1977), *cert. denied*, 434 U.S. 975 (1978), and *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980). Petition at 11. *Stern* and *Gorman Towers* were each claims both under specific statutes and under state common law tort principles. 626 F.2d at 609 (claim under 42 U.S.C. § 1983); 547 F.2d at 1331-32 (claim under 42 U.S.C. § 1985(1)). In each, the circuit court followed the reasoning of *Noerr-Pennington* to find that Congress did not intend to address petitioning behavior by the statute in question. 626 F.2d at 614-15; 547 F.2d at 1344 (*Noerr-Pennington* "provides a useful analogy"). Neither *Stern* nor *Gorman Towers* had occasion to decide the relationship between state common law tort principles and the Petition Clause because both dismissed the state law claim for lack of remaining federal question. 626 F.2d at 616; 547 F.2d at 1344.

The Seventh Circuit, however, expressed its general agreement with the position now adopted by the Fourth Circuit. The *Stern* court stated:

We have no quarrel with the proposition that a state's interest in protecting its citizens from common law torts justifies overriding . . . First Amendment considerations when knowing falsity is alleged, and although expressing no opinion one way or the other *we are not to be understood as implying that Stern's common law [defamation] theories are unmeritorious*. A similar overriding of the right to petition might likewise be sustainable in federal legislation which clearly and narrowly intended that effect.

Stern v. United States Gypsum, Inc., 547 F.2d at 1345 (emphasis added).

McDonald boldly states that *Stern* and *Gorman Towers* decide what they refused to decide. In doing so, he refuses to distinguish between cases based on *Noerr-Pennington* and the absence of Congressional intent to

limit petitioning behavior by particular statutes, on the one hand, and the interaction between state common law torts and the Petition Clause, on the other. McDonald, thereby, attempts to produce the illusion of conflict, even though none exists.³ Both *Stern* and *Gorman Towers* recognize an absolute immunity for the respective defendants from liability pursuant to specific statutes, but neither expands that immunity to deny tort liability and the *Stern* court indicates that it would not.

II. THE STATE CASES UPON WHICH McDONALD RELIES WOULD EXCLUDE PETITIONER'S BEHAVIOR FROM ANY FIRST AMENDMENT PRIVILEGE, THEREBY PRECLUDING JUDGMENT ON THE PLEADINGS.

McDonald seeks this Court's review based upon a conflict between the Fourth Circuit decision below and decisions of the highest courts of Maryland and West Virginia. Petition at 6-10. Both *Sherrard v. Hull*, 296 Md. 189, 460 A.2d 601, *affirming* 53 Md. App. 553, 456 A.2d 59 (1983), and *Webb v. Fury*, 282 S.E.2d 28 (W. Va. 1981), hold that the First Amendment provides an absolute privilege from tort liability for petitioning behavior. Both cases, however, define petitioning activity in such a way that McDonald's defamation would be excluded from any privilege at all and neither court would grant him judgment on the pleadings.

"Inherent in the words 'petitioning for redress of grievances' is the concept that the words contained in the petition will relate to the redress sought and that the

³ It is also significant to note that *Stern* gives considerable weight to the fact that the statements involved were made directly to the appropriate federal official (the supervisor of the plaintiff IRS officer) and that an administrative procedure existed for the plaintiff to vindicate himself. 547 F.2d at 1344. McDonald neither limited his libelous "petition" to the officers associated with his grievance, nor is there any avenue available to Smith for vindication except this action. See, *infra*, sec. III.

petitioner is genuinely seeking redress." *Sherrard v. Hull*, 456 A.2d at 71. *Sherrard* found that the defendant's behavior was protected, if the jury determined that she was seeking redress of grievances caused by the county commissioners to whom she was speaking and who "had the power to address many of the concerns she raised." *Id.* at 70. Properly directing the petition is, therefore, necessary to the privilege the Maryland court found. *Id.* at 71; see *Bass v. Rohr*, 57 Md. App. 609, 471 A.2d 752, 758, cert. granted, 300 Md. 88, 475 A.2d 1200 (1984) (finding the same privilege where petition directed to the administrative agency whose "function[] is to receive and consider consumer complaints.").

Similarly, the West Virginia Supreme Court found a privilege where the petition was made "through 'proper and established channels.'" *Webb v. Fury*, 282 S.E.2d at 39. There the defendant had complained about the plaintiff's surface mining practices to the Office of Surface Mining, "the agency charged with enforcement of the Surface Mining Reclamation Act," and to the Environmental Protection Agency, "the agency charged with enforcing and licensing the discharge of materials into water courses under the Clean Water Act." *Id.* at 37. The West Virginia Supreme Court determined that such petitions are "actually encouraged under the citizen participation provisions of [the two federal statutes]." *Id.* at 37-38.

The *Webb* court quoted with approval the Seventh Circuit's language in *Stern* addressing improperly presented complaints:

A scurrilous anonymous letter or an attempt to marshal political clout to ruin an offending [IRS] agent would certainly present different cases than does this open straightforward petition lodged through what the parties agree to be the proper and established channels.

Id. at 39 (quoting *Stern v. United States Gypsum, Inc.*, 547 F.2d at 1343) (emphasis added).

McDonald admits that Smith has alleged properly that the libel was published to persons unrelated to the appointment process. Petition at 2, n.2. Therefore, the libel could not be privileged petitioning activity under the West Virginia and Maryland decisions. Rather it is "an attempt to marshall political clout to ruin" Smith and, therefore, a much "different case[]" than the petitions considered in those state cases. *Webb v. Fury*, 282 S.E. 2d at 39 (quoting *Stern*, 547 F.2d at 1343).⁴

Resolution of the conflict between the Fourth Circuit below and the highest courts of Maryland and West Virginia would not result in granting McDonald's motion for judgment on the pleadings. A trial would be necessary in this case under either construction of the Petition Clause. See *Sherrard v. Hull*, 456 A.2d at 70 ("a directed verdict for either party would have been inappropriate"). Resolution of the conflict between the Fourth Circuit and the highest courts of Maryland and West Virginia would not result in judgment on the pleadings, thereby avoiding trial in this case, and the result at trial might well avoid any occasion to determine any Constitutional issue between these parties.

III. THE FOURTH CIRCUIT PROPERLY RELIED UPON A RELEVANT DECISION OF THIS COURT.

The decisions below follow an early, but undisturbed, ruling of this Court, *White v. Nicholls*, 44 U.S. (3 How.)

⁴ *Webb* goes on to find a publicity campaign to be protected as petitioning behavior and as free speech. *Webb v. Fury*, 282 S.E.2d at 43. Even were this Court to agree with such a construction of *Noerr-Pennington*, the publication here was not to the public generally, where ideas clash to mold public opinion and thereby influence policy. See *id.* at 42. Rather, McDonald's publications were to selected persons possibly in a position to exercise the "political clout to ruin" Smith, the very activity excluded by *Webb* from any privilege. *Id.* at 39.

266 (1845).⁵ Petition, App. A. at 3a, App. B at 22a-24a. Respondent Smith, like the district court,

is led [by *White*] to the inescapable conclusion that the Supreme Court of 1845 would have ruled accordingly if there were any basis for finding that the first amendment afforded an absolute defense to a libel action that was unavailable at common law in the District of Columbia, a jurisdiction where the Federal Constitution was applicable.

Id. at 23a.

McDonald presents three arguments in its attempt to discredit the lower courts' reliance upon *White*. First, he argues that "*White* was decided well before the First Amendment, including the Petition Clause, was held to apply to state action at all." Petition at 20. This argument is meritless. *White* was a District of Columbia case and the First Amendment was applicable to the District of Columbia, as the court below clearly stated. Petition, App. B at 23a.

Second, McDonald argues that "*White* was not a constitutional case at all." Petition at 20. In *White*, however, "Defense counsel raised the constitutional issue . . .," as the district court below specifically noted. Petition, App. B at 22a n.9. This Court recognized in *White* that a petition was involved and determined, applying common law principles, that no absolute privilege existed. *White v. Nicholls*, 44 U.S. at 288. The district

⁵ McDonald misrepresents this Court's recent treatment of *White*. This Court declined to rely on dicta in *White* addressing a question presented neither by *White* or this case. *Briscoe v. LaHue*, 460 U.S. 325, 332 n.12 (1983). Citing that footnoted treatment of dicta, McDonald represents that the Court opined that *White* was neither a reliable statement of the common law, nor authoritative. Petition at 20 n.22. The Court did neither; it merely stated that *White*'s "discussion of privileged statements in judicial proceedings was purely dictum" and that, as to such statements, *White* "cannot be considered authoritative." *Id.*

court reasonably concluded that, if some greater privilege existed under the Constitution than at common law, this Court would have so held. McDonald's contrary argument rests upon the absurd proposition that this Court would fail to apply the Constitution in deciding a case in which a constitutional issue was raised and would have required a different result.

Third, McDonald argues that the Fourth Circuit interpreted the *Noerr-Pennington* decisions in a way inconsistent with the interpretations of the Seventh and Eighth Circuits. Petition at 10-13, 21. As discussed above, no such conflict exists.

IV. ANY CLAIM FOR JUDICIAL DISCRETION TO AWARD ATTORNEY'S FEES TO PREVAILING DEFENDANTS MUST BE PRESENTED BY A PREVAILING DEFENDANT.

McDonald seeks to have this Court determine what rights he might have were he to prevail at trial. Petition at i, 19. Understandably neither court below addressed this question, as McDonald has not prevailed.

To consider the hypothetical question presented would not comport with this Courts well-established view of its role. As to these parties, no ripe case or controversy exists concerning the rights of prevailing libel defendants. See U.S. Const., Art. III.

CONCLUSION

The petition for a writ of certiorari should be denied.

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